84-156

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No. .....

In The

Supreme Court of the United States

October Term 1984

—o—

MACON ASSOCIATION FOR RETARDED CITIZENS,

Appellant,

vs.

MACON-BIBB COUNTY PLANNING AND ZONING COMMISSION,

Appellee.

—o—

On Appeal From The Supreme Court Of Georgia

—o—

JURISDICTIONAL STATEMENT

—o—

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QUESTIONS PRESENTED

I.

WHETHER THE GEORGIA SUPREME COURT ERRED WHEN IT DETERMINED THAT A ZONING ORDINANCE WHICH WHEN APPLIED PROHIBITED THE RESIDENTIAL USE OF HOMES BASED ON AN INDIVIDUAL'S STATUS AS A MENTALLY RETARDED PERSON WITHSTOOD CONSTITUTIONAL CHALLENGE AS BEING RATIONALLY RELATED TO A LEGITIMATE GOVERNMENT PURPOSE.

II.

WHETHER THE GEORGIA SUPREME COURT ERRED AS A MATTER OF LAW AND FACT IN APPLYING THE RATIONAL BASIS TEST FOR EXAMINING THE EQUAL PROTECTION CLAIM GENERATED BY THE DENIAL OF A HOUSING PERMIT TO A HOME FOR THE MENTALLY RETARDED IN THAT A STRICTER STANDARD OF SCRUTINY SHOULD HAVE BEEN APPLIED.

III.

WHETHER THE GEORGIA SUPREME COURT ERRED AS A MATTER OF LAW AND FACT IN HOLDING THAT THE CASE OF *VILLAGE OF BELLE TERRE VS. BORAAS*, 416 U.S. 1 (1974) REQUIRED THE USE OF A RATIONAL BASIS TEST CONCERNING THE FACTS, RIGHTS AND CLASS PRESENTED IN THIS ACTION.

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On Appeal From The Supreme Court Of Georgia

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JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

The Macon Association for Retarded Citizens (hereinafter "MARC"), the appellant, appeals from the final judgment of the Supreme Court of Georgia, dated May 1, 1984, holding that Section 4.14 of the Comprehensive Land Development Resolution for the City of Macon and Bibb

County, Georgia and said entities' failure pursuant to that resolution to grant a construction permit for a residential group home for mentally retarded individuals, did not violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

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OPINIONS BELOW

The following are reproduced in their entirety in the appendix:

The Judgment of the Superior Court of Bibb County dated November 15, 1983 (Appendix C).

The Opinion of the Supreme Court of Georgia dated April 4, 1984 (Appendix A).

The Order of the Supreme Court of Georgia dated May 1, 1984 denying Appellant's Motion for Rehearing (Appendix B).

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JURISDICTIONAL BASIS

This zoning case originally came on for hearing before the Macon-Bibb County Planning and Zoning Commission in May, 1983.

Appellant petitioned the Superior Court of Bibb County for Certiorari to review the July, 1983 decision of the appellee. On November 15, 1983, said court entered judgment for the appellee.

On April 4, 1984, the Supreme Court of Georgia denied the appeal of appellant holding *inter alia,* that no violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution was shown. Appellant's Motion for Rehearing was denied on May 1, 1984.

Jurisdiction over this matter is conferred upon this Court by 28 U.S.C. §1257(2).

QUESTIONS PRESENTED

I.

WHETHER THE GEORGIA SUPREME COURT ERRED WHEN IT DETERMINED THAT A ZONING ORDINANCE WHICH WHEN APPLIED PROHIBITED THE RESIDENTIAL USE OF HOMES BASED ON AN INDIVIDUAL'S STATUS AS A MENTALLY RETARDED PERSON WITHSTOOD CONSTITUTIONAL CHALLENGE AS BEING RATIONALLY RELATED TO A LEGITIMATE GOVERNMENT PURPOSE.

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III.

WHETHER THE GEORGIA SUPREME COURT ERRED AS A MATTER OF LAW AND FACT IN HOLDING THAT THE CASE OF *VILLAGE OF BELLE TERRE VS. BORAAS*, 416 U.S. 1 (1974) REQUIRED THE USE OF A RATIONAL BASIS TEST CONCERNING THE FACTS, RIGHTS AND CLASS PRESENTED IN THIS ACTION.

CONSTITUTIONAL PROVISIONS AND RESOLUTIONS

The Fourteenth Amendment of the United States Constitution provides, in part:

> No state shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Language from the Resolution provides, in part:

A group family home is defined as:

A home established under the "Community Services Act for the Mentally Retarded," (Ga. Laws 1972, p. 700) and maintained by the Bibb County Board of Health, the Georgia Department of Human Resources, or the U.S. Department of Housing and Urban De-

velopment, with the number of mentally retarded individuals limited to a maximum of five (5) with the maximum of two (2) surrogate parents.

A mentally retarded person is defined as:

A person over the age of eighteen (18) having a significantly sub-average general intellectual functioning (indicated by standardized intelligence test score ranging from 36 to 70, existing concurrently with deficits in adaptive behavior which originates in the developmental period.)

The provision in question is:

A dwelling unit may be occupied by not more than one family and such family may consist of not more than one of the following: (1) One person or two or more persons related by blood or marriage, with no more than two roomers or boarders and with any number of natural children, foster children, stepchildren or adopted children; or (2) a group of not more than four persons not necessarily related by blood or marriage.

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RAISING THE FEDERAL QUESTIONS

The constitutional questions were raised at the earliest stages of this proceeding. Appellant initially sought to amend the Resolution so as to cure constitutional defects. The Equal Protection claim was then raised in the Superior Court of Bibb County. (Attachment C at 16). The rejection of that argument was appealed to the Supreme Court of Georgia. As the opinion of that court indicated, it rejected the use of heightened scrutiny in its application of the Fourteenth Amendment and then held that the Resolution passed the rational basis

analysis. (Attachment A at 5-6). Thus the Georgia Supreme Court expressly considered and rejected this federal constitutional claim.

STATEMENT OF THE CASE

Appellant presently owns an option to purchase real estate at 1972 Wood Valley Road, Macon, Georgia, for the purpose of constructing a group family home (as described below), to be financed by the Department of Housing and Urban Development (HUD) through the use of moneys allocated in September, 1982.

In March, 1983, appellant asked appellee's staff for a permit to construct a group family home at the above address, but its request was denied. Appellant then petitioned appellee to amend the language of the Comprehensive Land Development Resolution for the City of Macon and Bibb County, Georgia, adopted and effective October 26, 1981 (herein the "Resolution"), so as to permit the use of R-1 AAA through R-3 residential districts for such homes.

Structurally, a group family home is very similar to any other home in the R-1 AAA through R-3 zones. It has a large dining room, den and one bedroom per client and is made of brick at a cost in excess of One Hundred and Thirty-Three Thousand Dollars ($133,000.00). It is intended for family-like residential use. The only structural differences are that a HUD home has wider hallways and has facilities in the bathrooms for clients who need wheelchairs.

The known impact of the Resolution prevents the operation of group homes in residential areas. This occurred through its limitation of four adults, including the two house parents. Homes limited to two mentally retarded adults are fiscally impossible to open, nor are such small homes generally funded by HUD or approved by the State of Georgia.

Appellant's position to amend the Resolution came on for hearing before the appellee on May 9, 1983 and June 27, 1983. Pursuant to these hearings, the appellee denied appellant's petition, and this denial was later upheld on certiorari by the Bibb County Superior Court in Civil Action No. 603-C, order entered on November 15, 1983.

The Superior Court of Bibb County ruled, *inter alia,* that (1) absent a suspect classification all appellee must show is that there is a rational basis for defining occupancy of a single family dwelling in the manner it has done; and that (2) appellee is not engaging in any type of constitutionally prohibited discrimination.

Appellant appealed the judgment of the Bibb County Superior Court directly to the Georgia Supreme Court on several grounds. Included was the enumeration that the Bibb County Superior Court had erred as a matter of law and fact in applying the rational basis test to examine the constitutionality of the definition in the Resolution of the permitted occupancy of a single family dwelling.

On April 4, 1984, the Georgia Supreme Court issued its opinion (Appendix A), that *inter alia,* there is nothing on the face of Section 4.14 of the Resolution which dis-

criminates against mentally retarded individuals. On May 1, 1984, the Supreme Court of Georgia, in a 5-2 vote, denied the appellant's motion for rehearing.

Further, in their holding the Georgia Supreme Court cited *Village of Belle Terre v. Boraas,* 416 U.S. 1 (1974) as support for its choice of scrutiny. It did so without any analysis of the rights infringed by the individuals before it, (a group of adult mentally retarded persons seeking permanent residences), nor did it address the heightened scrutiny tests utilized by this Court and other federal courts concerning discreet and historically disadvantaged groups of persons.

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THE FEDERAL QUESTION IS SUBSTANTIAL

A) Summary

The determination of the Georgia Supreme Court that the ordinance withstood a rational basis analysis is error. The ordinance in question classifies not based on use or appearance of the homes or on concerns for density or numbers of occupants, but only on the immutable characteristics of the occupants. An analysis of all possible governmental interests associated with zoning restrictions shows that this is irrational.

Assuming that the ordinance is rational, the question of what level of scrutiny to utilize in addressing the conflict between zoning restrictions and the growing movement of the mentally retarded into normal living patterns in our communities is substantial. It has never been ad-

dressed by this Court before. The question has been answered by federal circuit courts of appeal. Their analysis directly conflicts with the conclusion of the Supreme Court of Georgia.

Moreover, the opinions of this Court demonstrate that the lower courts must analyze the nature of the interests at stake and the group or class affected in determining the appropriate level of scrutiny. These levels range from the rational basis into middle tier and then strict scrutiny. This was not done by the Supreme Court of Georgia. If that court had properly allocated the standard of review it would have been constrained to invalidate the challenged ordinance.

B) The Ordinance Is Not Rationally Related To Any Permissible Governmental Purpose

When zoning is invoked, it is subject to constitutional standards. *Nectow v. City of Cambridge,* 277 U.S. 183 (1927). These standards were initially set forth in *Village of Euclid v. Amber Realty Co.,* 272 U.S. 365 (1926), where this Court held that zoning is only justified to protect the public's health, safety, welfare, and morals through the exercise of the state's police power. *Village of Euclid v. Amber Realty Co.,* 272 U.S. 365 (1926).

Zoning may constitutionally restrict overcrowding, regulate traffic and congestion or avoid undue hardships on available governmental facilities. *Moore v. City of East Cleveland,* 431 U.S. 494 (1977). Such health and safety regulations are within the sovereign's police power. *Village of Belle Terre v. Boraas,* 416 U.S. 1 (1974).

Applying these standards the ordinance cannot tie itself to any legitimate or rational governmental purpose. The provision through its numerical limitations effectively excludes group homes. They become too costly and they are eliminated from residential neighborhoods. Concerns with traffic density do not support it as the clients will not drive or own vehicles. Any concerns with public safety or morals due to any individual's status as retarded can only be tied to historic misperceptions. Such fictions cannot support the regulation.

Further, it is irrational to grant favored status to foster homes of any size over the mentally retarded. Such exceptions to the numerical limitation cut away from any safety or health rationale. These distinctions demonstrate the irrationality of the classifications.

C) The Ordinance Should Have Been Subjected To Stepped-Up Scrutiny

The first step in an equal protection case is for the court to determine the appropriate level of scrutiny. *San Antonio Independent Sch. District v. Rodriguez,* 411 U.S. 1 (1973). In this determination one looks first to the interests impaired. If the interest is fundamental or if substantial personal interests are at stakes, then heightened scrutiny applies. E.g., *Plyler v. Doe,* 457 U.S. 202 (1982). Alternatively one must review the classification. If it is a suspect or quasi-suspect then heightened scrutiny similarly applies. *Plyler v. Doe,* 457 U.S. 202 (1982).

Addressing the latter test, this Court has identified four indicia of suspectness. Suspect classifications are generally based on "an immutable characteristic deter-

mined solely by the accident of birth." *Frontiero v. Richardson,* 411 U.S. 677, 686 (1973). The basis of characterizations "frequently bears no relation to ability to perform or contribute to society." *Id.* at 686. In addition, suspect classifications tend to be "discreet and insular" minorities. *Graham v. Richardson,* 403 U.S. 365, 372 (1971), *citing United States v. Carolene Pdts. Co.,* 304 U.S. 144, 152-53 (1938). Finally, suspect groups are usually ones which have been "saddled with such disabilities or subject to such a history of purposeful unequal treatment . . . as to command extraordinary protection. . . ." *San Antonio Indep. School Dist. v. Rodriguez,* 411 U.S. 1, 28 (1973).

Mental retardation partakes of all but one of these criteria. Many retarded individuals are retarded from birth, and the conditions of most retarded children are not subject to remission or reversal. The mentally retarded are a discreet and insular minority, easily identifiable and outside the mainstream of experience. Also, historically, the retarded have been subject to intentional discrimination. While a person's retardation can affect his ability to perform or contribute to society in the traditional sense, there are a number of activities which he can perform or for which he can be trained.

None of the indicia of suspectness is *sine qua non* to a finding that a classification is suspect. Yet there are substantial grounds on which to hold that classification on the basis of mental retardation is a suspect classification. If this is true, the failure of appellee to accord mentally retarded individuals living in families the same access to residential areas that so-called normal step-children, foster children and adopted children have is clearly a denial

of equal protection, since no compelling state interest exists to support such a failure.

If mental retardation does not constitute a suspect classification, it shares enough of the indicia of suspectness to be treated as a "quasi-suspect" class under the "middle-tier" equal protection test. *Plyler v. Doe,* 457 U.S. 202 (1982); *Cleburne Living Center v. City of Cleburne, Tex.,* 726 F.2d 191 (5th Cir. 1984); *Fialkowski v. Shapp,* 405 F. Supp. 946 (E.D. Pa. 1975). See, *Sterling v. Harris,* 478 F. Supp. 1046 (E.D. Ill. 1979) and Gunther, *The Supreme Court, 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 Harv. L. Rev. 1 (1972). Under this test, the courts are to seek ". . . the assurance that the classification reflects a reasoned judgment consistent with (the) ideal of equal protection by inquiring whether it may fairly be viewed as furthering a substantial interest of the State." *Plyler v. Doe,* 457 U.S. 202, 217-18 (1982). Further, under this test, a classification is unconstitutional if it bears no rational relation to the purpose for the challenged program. *Craig v. Boren,* 429 U.S. 190 (1976) (gender); *Frontiero v. Richardson,* 411 U.S. 677 (1973) (gender); *Trimble v. Gordon,* 430 U.S. 762 (1977) (illegitimacy).

Most recent of the cases requiring middle-tier scrutiny is that of *Cleburne Living Center v. City of Cleburne, Tex.,* 726 F.2d 191 (5th Cir. 1984). There, Jan Hannah, on behalf of Cleburne Living Centers, Inc., a Texas corporation, purchased a house. Cleburne Living Centers, Inc. is a Texas corporation organized for the purpose of establishing and operating supervised group homes for

the mentally retarded. As such, that organization is very similar to the appellant in the instant case. There, the disputed home was to house thirteen men and women who were mildly or moderately retarded. In this respect the facts of that case are different, because the number of mentally retarded adults sought to occupy the group family homes in the present case is limited to five or fewer and the instant home resembles a single-family residence. Like the appellant's homes, however, the Cleburne Living Center homes were to teach the residents such things as cooking and cleaning and the enjoyment of leisure time activities. Similarly, the residents there were to have jobs in the community and in work activity centers.

One of the issues was whether the Cleburne ordinance on its face and in application violated the Equal Protection and Due Process clauses of the Constitution. Recognizing that the issue of the appropriate level of scrutiny was one of first impression, the Fifth Circuit in *Cleburne* analyzed the indicia of suspectness and found that the mentally retarded possess enough of the characteristics of a suspect class to warrant middle-tier or heightened scrutiny. *Cleburne Living Center v. City of Cleburne, Tex.*, 726 F.2d 191, 197, 198 (5th Cir. 1984).

Once the court in *Cleburne* found middle-tier scrutiny to be appropriate, it had little trouble in holding the ordinance in question ". . . unconstitutional both on its face and as applied." *Id.* 726 F.2d at 200.

Similar results have been reached by other federal courts. See, *J.W. v. City of Tacoma, Washington,* 720 F.2d 1126 (9th Cir. 1983); *Association for Retarded Citizens of N.D. v. Olsen,* 561 F. Supp. 473, 490 (D.N.D. 1982);

Sterling v. Harris, 478 F. Supp. 1046, 1056 (N.D. Ill. 1979), *rev'd on other grounds sub nom., Schweiker v. Wilson,* 450 U.S. 221 (1981). But see, *Anderson v. Banks,* 520 F. Supp. 472, 512 (S.D. Ga. 1982).

D) The Justification For The Ordinance Falls To Heightened Scrutiny

The appellant has "sensitive and personal rights at stake." *Weber v. Aetna Casualty & Sur. Co.,* 406 U.S. 164, 172 (1972). These include the liberty interests inherent in deinstitutionalization; the right to family and home; and the right to travel. The appellee not only never demonstrated a substantial interest supporting the ordinance but its statute is also arbitrary and capricious. Witness the comment of the appellee's Chairman, Mr. Smith, recorded in the appellee's deliberations of June 27, 1983, as follows:

> Mr. Smith: I'm talking about when we are trying to define a dwelling unit or a family or whatever we're trying to do our regulations say that as far as our R-1 AAA or whatever the designation is a group of people of not more than four persons not necessarily related by blood or marriage can live in a house and it can still be considered a single family house and I don't think that's a valid definition of single family house. I think that we should define family, whatever that is and then that's it as for a single family dwelling. And I don't see [sic] you can interpret it any other way. Because a group of four people unrelated by blood or marriage *is not a family and it cannot be construed to be so under anybody's definition, and I don't think* [*sic*] *and so why should they be able to live in a single-family neighborhood.* (Emphasis added.)

Thus, even the Chairman of the appellee who voted against the appellant, thinks of the subject provision as missing the mark "under anybody's definition." Appellant submits that "arbitrary" and "capricious" are accurate terms for a definition which can elicit such a wholesale condemnation from its own proponent.

On the other hand, courts across the country are holding consistently that group family homes with surrogate parents fall within the definitions of family. *Costley v. Caromin House, Inc.*, 313 N.W.2d 21 (Minn. 1981); *Douglas County Resources, Inc. v. Daniel*, 247 Ga. 785 (1981); *Township of Washington v. Cent. Bergen County M.H. Ctr.*, 383 A.2d 1194 (N.J. 1978); *Hessling v. City of Broomfield*, 563 P.2d 12 (Colo. 1977); *Oliver v. Zoning Commission of Town of Chester*, 326 A.2d 841 (Conn. 1974).[1]

A further indication of the irrationality of the subject regulation is its use of "adults" as an exclusionary criteria. That standard may apply to most of the population, but it has little application to the mentally retarded, many of whom suffer disabilities which limit their exercise of adulthood. The residents of a group family home will not be married, won't have drivers' licenses and will be supervised by other adults. In these respects, the mentally retarded are more like children than adults. It thus becomes all the more incomprehensible that foster children of any number can live in R-1 AAA areas under

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[1] Most of these courts decided the questions on statutory construction grounds or on an analysis of the governmental nature of group homes. Georgia, almost singularly, removed itself from the mainstream in holding adversely to appellants on those issues. This necessitated the rulings on the constitutional chalenge.

the subject provision, whereas mentally retarded adults, who often times have greater dependence, cannot.

Despite the above authority to the contrary, the Georgia Supreme Court gave little heed to the issue of what level of scrutiny it was to apply. Appellant assigns this short shrift treatment as reversible error justifying the noting of jurisdiction by this Court.

E) Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) Has No Application To A Situation In Which The Mentally Retarded Are Being Discriminated Against

On page six of its opinion, the Georgia Supreme Court held that the Resolution's ". . . definition of family withstands equal protection scrutiny under *Village of Belle Terre v. Boraas,* 416 U.S. 1 (94 SC 1536, 39 L.E.2d 797) (1974)." (Appendix B at page six). *Village of Belle Terre v. Boraas,* 416 U.S. 1 (1974) is clearly inapposite to the facts of the case *sub judice.* There an action was instituted challenging the constitutionality of the zoning ordinance of the Village of Belle Terre, New York, restricting land use to one-family dwellings. It prohibited occupancy of a dwelling by more than two unrelated persons while permitting occupancy by any number of persons related by blood, adoption or marriage. The owners of the house in question, and three of the six unrelated college students who rented the house, contended that the zoning ordinance violated, *inter alia,* their equal protection rights.

There, not surprisingly, this Court used minimum scrutiny because "[w]e deal with economic and social legislation where legislatures have historically drawn lines

which we respect . . . if the law be reasonable, not arbitrary." 416 U.S. at 8.

But there, this Court was dealing with a class of individuals—six unrelated college students renting a house which is far removed from a group of five mentally retarded adults. They have no "immutable characteristic determined solely by accident at birth" (*Frontiero v. Richardson,* 411 U.S. 677, 686 (1973)), as do the mentally retarded. They are not "discreet and insular" minorities (*Graham v. Richardson,* 403 U.S. 365, 372 (1971)), as are the mentally retarded. And they are anything but "saddled with such disabilities or subject to such a history of purposeful unequal treatment . . . as to command extraordinary protection . . ." (*San Antonio Indep. School District v. Rodriguez,* 411 U.S. 1 (1973)).

College students are free to travel, operate their own motorcycles and automobiles, associate with anyone they choose, enter any kind of employment imaginable, and engage in a panoramic range of activities available to persons at their end of the intellectual spectrum. They are also unsupervised when they reside in residential neighborhoods.

In striking contrast, options available to the mentally retarded are severely limited to those occupations, if any, available to a person with an I.Q. of 69 and below, to those social activities generally open only to other mentally retarded individuals and to those selected household tasks which the mentally retarded can perform. They will have live-in house parents.

The limitations of the *Belle Terre* holding has been recognized by other courts. E.g., *White Plains v. Fer-*

raioli, 34 N.Y.2d 300, 313 N.E.2d 756 (N.Y. Ct.App. 1974). Cf. *City of Des Plaines v. Trottner,* 216 N.E.2d 116 (Ill. S. Ct. 1966); and *State ex rel. Ellis v. Liddle,* 520 S.W.2d 644 (Mo. Ct. App. 1975).

In light of the polar differences between classes of unrelated college students on the one hand and the mentally retarded on the other, the rational basis test used in *Village of Belle Terre v. Boraas,* 426 U.S. 1 (1974) is clearly inapplicable. It was error for the Georgia Supreme Court to apply it to the facts of this case, apparently to the exclusion of all other United States Supreme Court cases.

CONCLUSION

This Court should note jurisdiction in this case. The holding directly conflicts with rulings of several federal courts. It also misapplies rulings of this Court. Finally, the rationale under the minimal scrutiny test is fatally flawed.

Respectfully submitted,

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APPENDIX A

In the Supreme Court of Georgia

Decided: April 4, 1984

40623. MACON ASSOCIATION FOR RETARDED CITIZENS v. MACON-BIBB COUNTY PLANNING AND ZONING COMMISSION.

MARSHALL, Presiding Justice.

The Macon Association for Retarded Citizens, a non-profit organization which is governmentally financed, submitted a petition to the Macon-Bibb County Planning and Zoning Commission (the Commission) requesting that the Commission amend its Comprehensive Land Development Resolution for Macon and Bibb County (Resolution) so as to permit homes under the Community Services Act for the Mentally Retarded (Ga. L. 1972, p. 100 et seq.; OCGA § 37-5-1 et seq.) in zoning districts in which such usages would otherwise be prohibited. The Commission denied the petition. On writ of certiorari to the superior court, the superior court sustained the Commission's decision. Issues facing the superior court and this court are whether the equal-protection rights of the mentally retarded have been violated and whether the proposed homes for the mentally retarded are exempt from local zoning regulations. The superior court resolved these issues against the petitioner-association. For reasons which follow, we agree and affirm.

Pursuant to a special amendment to the Georgia Constitution (Art. VI, Sec. I, Par. IV of the Ga. Constitution of 1945; Ga. L. 1947, p. 1240), the City of Macon and Bibb County created the Macon-Bibb County Planning and Zoning Commission and vested the Commission with legisla-

tive power and authority to exercise planning and zoning for Macon and Bibb County. See *Birdsey v. Wesleyan College,* 211 Ga. 583 (87 SE2d 378) (1955); *Baker v. Macon-Bibb County Planning &c. Commn.,* 118 Ga. App. 686 (165 SE2d 430) (1968). (This distinguishes the Macon-Bibb County Planning and Zoning Commission from other planning commissions established under state statutory law (Code Ann. § 69-1201 et seq.; Ga. L. 1960, p. 1037, as amended; repealed by Ga. L. 1981, p. 3). The general function of such commissions is to act as an advisory or recommending agency to the legislative department of city or county government. *Royal Atlanta Dev. Corp. v. Staffieri,* 236 Ga. 143, 145 (223 SE2d 128) (1976).)

In 1981, the Commission adopted the Resolution dividing Macon and Bibb County into 28 zoning districts in order to, among other things, protect the character of existing neighborhoods, prevent population density in areas not served by adequate government services, and to promote orderly growth and development. Under this Resolution, "permitted" or "conditional" uses of land are established for each zoning district. For a permitted use, a certificate of zoning compliance may be issued by the Zoning and Enforcement Officer without a hearing; however, if the use would impact unfavorably on adjoining property, upon recommendation of the Zoning Enforcement Officer a public hearing may be held thereon and buffer areas and screening may be required. A conditional use is allowed only after the Commission conducts a hearing and enters certain findings to the effect that the proposed use or uses will be: consistent with the general plan for the area, in harmony with the general character of the

area, and served by adequate public services. There are also provisions for amending the resolution.

In April of 1983, the petitioner submitted a petition to the Commission requesting that the Resolution be amended so as to permit in single-family residential districts (R-1AAA, R-1AA, R-1A, R-1, R-2A, R-2, R-3) homes under the Community Services Act for the Mentally Retarded with the number of mentally retarded individuals limited to a maximum of five adults with a maximum of two surrogate parents. These homes would be maintained by the Bibb County Board of Health, the Georgia Department of Human Resources, or the United States Department of Housing and Urban Development.

Under § 4.14 of the Resolution, a dwelling unit in such districts may not be occupied by more than one family, and the Resolution states that, "such family may consist of not more than (1) of the following: [1] One (1) person or two (2) or more persons related by blood or marriage, with no more than two (2) roomers or boarders, and with any number of natural children, foster children, stepchildren or adopted children; or (2) a group of not more than four (4) persons not necessarily related by blood or marriage."

The Resolution (§ 1.02 [105]) also provides for "supportive living homes" defined as "A facility non-institutional in character in which is provided room, meals and personal care for 3 to 15 mentally ill adults. These homes are regulated and administered through the Mental Health Division of the Georgia Department of Human Resources." In addition, the Resolution (§ 102 [46]) provides for "group personal care homes," defined as "A home established under the 'Community Services Act for the Mentally Retarded' (Ga. Laws 1972, p. 700) and main-

tained by the Bibb County Board of Health, the Georgia Department of Human Resources, or the U.S. Department of Housing and Urban Development, with the number of mentally retarded individuals limited to the maximum of fifteen (15) with a minimum of three (3) supervisory personnel." These homes are permitted as a conditional use in R-3 residential districts, as well as in C-2, C-3 and C-4 districts.

Public hearings were held on the petitioner's proposed amendment in May and June of 1983. The petitioner stated that it had obtained an option for construction of two group family homes on a tract of land in Macon located in a single-family residential district, and that grants had also been obtained for construction of these homes. Following the hearings, the application was denied.

The petitioner filed a petition for writ of certiorari in the superior court, contending: (1) The Commission's decision violates the equal-protection rights of mentally retarded individuals. In making this argument, the petitioner asserts that the superior court erred in applying the rational-relation test in determining the constitutional question, in that the mentally ill represent at least a "quasi suspect" class thereby being entitled to a middle-tiered level of equal-protection scrutiny under the United States Supreme Court's multi-tiered equal-protection classification system. See Sterling v. Harris, 478 FSupp. 1046 (N.D. Ill. 1979). (2) The Commission's decision violates the policy of this state as expressed in OCGA § 37-5-2. (3) The Commission's decision is null and void because the petitioner's governmental function of providing housing for the mentally retarded is immune from operation of the

Resolution. (4) The Commission's decision is null and void because it does not treat five mentally retarded individuals living with two surrogate parents as a "family," in violation of Georgia law and case law from other jurisdictions.

The respondent-in-certiorari sought dismissal of the petition for writ of certiorari on various procedural grounds. As to the petitioner's attack on the Commission's decision, the superior court ruled as follows: (1) There is a rational basis for the definition of occupancy of a single-family dwelling contained in the Resolution, and the petitioner has failed to show that mentally retarded adults fall within a suspect classification under the equal-protection clause. (2) OCGA § 37-5-2 does not in any way require or imply that group family homes be allowed in any particular location. (3) Although the petitioner is a governmentally financed organization with its employees paid by the state, this home is being operated by a nonprofit organization or corporation and not a governmental agency or department. And, the petitioner is not an organization of such a governmental nature as to exempt it from regulation by local zoning ordinances. (4) *Douglas County Resources v. Daniel,* 247 Ga. 785 (280 SE2d 734) (1981), was found to be distinguishable.

Accordingly, the decision of the Commission denying the petitioner's proposed amendment to the Resolution was sustained.

1. In 1972, the General Assembly enacted the Community Services Act for the Mentally Retarded. As stated in the preamble, this Act is intended to authorize county boards of health to provide comprehensive com-

munity services for certain mentally retarded and other developmentally disabled persons and to authorize the Department of Public Health (now Department of Human Resources) to encourage and assist the county boards of health in planning and developing community services. Ga. L. 1972, p. 700. Under § 2 of the Act (OCGA § 37-5-2), the State of Georgia accepts a responsibility for its mentally retarded citizens, and the primary purpose of the Act is stated to be to provide community-based alternatives to total institutional care so that mentally retarded individuals can continue to live in their home communities. OCGA § 37-5-5 et seq.

2. It is true that the Resolution does contain separate classification for mentally ill or retarded individuals. However, the group homes for the mentally retarded which have been proposed here do not constitute permissible uses within single-family zoning districts, not because the inhabitants of the homes are mentally retarded, but rather because the inhabitants of the homes do not constitute one of the following: "[1] One (1) person or two (2) or more persons related by blood or marriage, with no more than two (2) roomers or boarders, and with any number of natural children, foster children, stepchildren or adopted children; or [2] a group of not more than four (4) persons not necessarily related by blood or marriage." In our opinion, there is nothing on the face of this definition of "family" which discriminates against mentally retarded individuals, and in our view, this definition of family withstands equal-protection scrutiny under Village of BelleTerre v. Borass, 416 U.S. 1 (94 SC 1536, 39 LE2d 797) (1974).

Had the proposed group homes here been for a group of mentally retarded individuals and/or surrogate parents

who constitute not more than four persons not related by blood or marriage, then a refusal to permit such homes in single-family districts would have constituted discrimination against the mentally retarded. This would have brought the case more in line with our holding in *Douglas County Resources, v. Daniel,* supra, wherein suit was brought to enjoin construction of a house as a group family residence for retarded citizens. The home was being constructed in a zoning district authorizing family residences and defining family as "[o]ne or more persons occupying a dwelling unit and living as a single, nonprofit housekeeping unit." 247 Ga., supra, at p. 786. Noting that there was no requirement in this ordinance that the parties occupying a housekeeping unit be related and that under the evidence the intended use of the home for retarded citizens was within the zoning classification, we held that, "To enjoin the use of the homes here because the intended occupants are retarded would discriminate against one group for reasons not established by the evidence." Id. The *Douglas County* case is, therefore, distinguishable from the present case.

3. It is a general rule that in their use of land a state government and its agencies are immune from operation of local zoning regulations. See City of Temple Terace v. Hillsborough Assoc. for Retarded Citizens, Inc., 322 S2d 571 (Fla. App. 1975). Comment, Government Immunity from Local Zoning Ordinances, 84 Harv. L. Rev. 869 (1971).

As pointed out in these primary and secondary authorities, this rule is supported by essentially four traditional tests: The Superior Sovereign Test, the Governmental-Propriety Test, the Power of Eminent Domain

Test, and the Statutory Guidance Test. The Superior Sovereign Test holds that since the state and its units and agenices occupy a superior position to municipalities in the governmental hierarchy, their exemption from municipal zoning regulation is a matter of preemption. The Governmental-Propriety Test holds that property of a state governmental unit is exempt from local zoning when a governmental function is being performed but not when a propriety function is being performed. Cases applying the Power of Eminent Domain Test take the position that when a political unit is authorized to condemn, it is automatically immune from local zoning regulation when it acts in furtherance of its designated public function. Under the Statutory Guidance Test, the courts simply look to the legislative statutes in order to glean some expression of legislative intent on the immunity question.

For various reasons, all of these tests have been criticized, as constituting nothing more than "unhelpful epithets." Comment, supra, 84 Harv. L. Rev., at p. 869. It thus has been suggested that these tests should be eschewed in favor of a balancing-of-interests test to resolve "the critical question of which governmental interests should prevail when there is a conflict between the zoning ordinance of one political unit and the statutory authority of another unit to perform a designated public function." Id. Accord, City of Temple Terrace v. Hillsborough Assoc. for Retarded Citzens, Inc., supra.

4. In Georgia, it has been held that property owned by the state or county, and used for a governmental purpose, is exempt from municipal zoning regulation, whether or not the property is acquired by eminent domain or by bargain and sale. *Evans v. Just Open Government,* 242

Ga. 834 (1) (251 SE2d 546) (1979) and cits. See also Attorney General Opinion 73-164 (opining that where a county board of health establishes a group home for mentally retarded individuals under the Community Services Act for the Mentally Retarded, a municipality is without authority to enforce zoning restrictions against this activity).

5. In at least three cases, there has been consideration of the specific question of whether a nonprofit corporation or association is exempt from local zoning laws in its operation of a community home for mentally retarded individuals. Region 10 Client Management, Inc. v. Town of Hamstead, 424 A2d 207 (N.H. 1980); Penobscot Area Housing Development Corp. v. City of Brewer, 434 A2d 14 (Me. 1981); City of Temple Terrace v. Hillsborough Assoc. for Retarded Citizens, Inc., supra.

(a) In Region 10, supra, it was found that the nonprofit corporation there had been designated by the Director of the Division of Mental Health for the State of New Hampshire to provide services, including community services for the retarded. It was held that the enabling state legislation establishing a statutory scheme for placing developmentally impaired persons in various locations throughout the state thereby preempted local zoning authority.

(b) Penobscot, supra, involved a nonprofit corporation organized to provide housing for retarded citizens pursuant, in part, to state legislation entitling the mentally retarded to living accommodations in an environment least restrictive of their liberty. The court rejected the argument that the corporation was exempt from local zon-

ing regulation, stating that it "[could] not conceive that by the statute cited the Legislature intended to exempt all such corporations from local zoning ordinances." 434 A2d, at p. 19.

(c) In City of Temple, supra, the trial court had held that an association's operation of a home for the mentally retarded was immune from a city zoning ordinance, on the ground that under the facts of that case the association stood in the shoes of the state in operating this home. The Florida Second District Court of Appeals reversed this judgment and remanded the case for further proceedings, holding that the traditional tests for determining whether a governmental unit is immune from the zoning law of a competing governmental unit should be jettisoned, and the admittedly nebulous balancing-of-interests test should be used to resolve the immunity question.

6. We reject the balancing-of-interests test, because it suffers too severely from its admitted flaws, i.e., it is too nebulous and judicially unmanageable. We find the better rule to be that property owned by a nonprofit corporation is not immune from local zoning regulations, even if the corporation is performing services which are governmental in nature, at least in the absence of a clear expression of intent by the legislature that such immunity be extended. We find no such expression of legislative intent in the Community Services Act for the Mentally Retarded.

Judgment affirmed. All the Justices concur, except Smith and Gregory, JJ., who dissent.

In the Supreme Court of Georgia

40623. MACON ASSOCIATION FOR RETARDED CITIZENS v. MACON-BIBB COUNTY PLANNING AND ZONING COMMISSION.

GREGORY, Justice, dissenting.

I respectfully dissent for the reason that I would hold the Macon Association for Retarded Citizens (MARC) is immune from local zoning ordinances in its performance of services mandated by state law which, but for the program of MARC, would be performed by the state. I base this in part on the rationale of Temple Terrace v. Hillsborough Association for Retarded Citizens, 322 S2d 571 (Fla. App. 1975), rejected by the majority. I would not reach the equal protection argument considered by the majority.

1. The Florida court in *Temple,* supra, found that the Association was performing services which the state was required to do under state law; the agency closely supervised the services provided by the Association; and the Association's services supplemented those provided state-wide by the agency. (The court went on to say that the trial court, on remand, should apply a "balancing of the interests" test to determine if the Association enjoyed governmental immunity from local zoning laws. This new "balancing of the interests" test need not be adopted, because the old tests are adequate to resolve the issues in this case.)

The rationale of *Temple,* supra, leads to the conclusion that MARC's claim to governmental immunity is the same as the state's. As in *Temple,* MARC has contracted with the state agency, DHR, to provide the group home services. The contract provides for payment of state

funds to MARC for salaries of personnel and maintenance of the residence. (The construction of the residence is to be financed by a federal grant from HUD.) State law expresses a policy for community placement of mentally retarded individuals, OCGA § 37-5-2, and places on county boards of health the obligation of providing such community services, OCGA § 37-5-5. Should a county board fail to meet its obligation, however, DHR is empowered to establish community services. OCGA § 37-5-7(b). One approved method of providing such services is for DHR to contract with private associations like MARC. OCGA § 37-1-20(b)(3). See also, 1973 Opinions of the Attorney General of Georgia, 73-164. Operation of group homes is regulated and closely monitored by DHR. See *Georgia Department of Human Resources, Standards for Group Homes for the Mentally Retarded, November 1976.*

From these authorities, the conclusion is easily reached that MARC, although a private association, is performing functions which are mandated by state law and would otherwise be performed by the state. Therefore, MARC is entitled to invoke the doctrine of governmental immunity to the same extent the state would be entitled were it operating the group home.

2. The question then becomes whether there would be immunity from the zoning ordinance if the state were operating the group home rather than MARC.

As discussed in the majority opinion, there are four traditional tests and one recent test in use to determine whether a state activity is immune from local zoning ordinances. The traditional tests are: the superior-sovereign test, the governmental-proprietary test, the eminent-domain test, and the statutory-guidance test. The

more recent test is one of balancing the interests. See Note, 84 Harv. L. Rev. 869 (1971). I would hold that overriding these tests is the principle that the clearly established public policy of the state may not be frustrated by local control. Thus, McQuillan writes: "On functions of statewide interest and concern, the general rule is that if the municipalities are not given specific authority to take over the function, the municipalities cannot thwart the state from performing its duty. Municipal zoning ordinances cannot be used to frustrate the implementation of state policy." (Citing Region 10 Client Management, Inc. v. Town of Hampstead, 120 N. H. 885 (424 A2d 207) (1980)). Courts holding that operation of a state-supported group home is entitled to immunity include Region 10 Client Management, supra; Berger v. State, 71 N. J. 206 (364 A2d 993) (1976); Connors v. New York State Association of Retarded Children, 82 Misc. 2d 861 (370 NYS2d 474) (1975); Ellis v. Liddle, 520 SW2d 644 (Mo. App. 1975) (state policy preempts local ordinance); City of Baltimore v. State Department of Health and Mental Hygiene, 38 Md. App. 270 (381 A2d 1188) (1978).

Georgia statutes express a strong policy in favor of community placement of mentally retarded persons. Chapter 5 of the Mental Health Code, enacted by 1972 Ga. Laws 700, is entitled "Community Services Act for the Mentally Retarded." OCGA § 37-5-2, entitled "Declaration of Policy," states: Since the State of Georgia accepts a responsibility for its mentally retarded citizens and an obligation to them which it must discharge, facilities, programs, and services shall be made available to meet the needs of each mentally retarded person during his entire

lifetime. *The primary purpose of this chapter shall be to provide community-based alternatives to total institutional care so that mentally retarded individuals can continue to live in their home communities.*" (Emphasis supplied.) The state's commitment to deinstitutionalization and community placement of mentally retarded persons is further reflected at OCGA § 37-4-121: "It is the policy of the state that the least restrictive alternative placement be secured for every client at every stage of his habilitation. It shall be the duty of the facility to assist the client in securing placement in noninstitutional community facilities and programs." The Community Service Act grants to DHR "all powers necessary to effectuate the purposes" of the Act. OCGA § 37-1-20(b) (13).

State policy favoring community placement of mentally retarded citizens can also be found in pronouncements of the judicial and executive branches of government. This court's decision in *Douglas County Resources v. Daniel,* 247 Ga. 785 (280 SE2d 734) (1981), indicated a strong preference for community placement. In the executive branch, *The Governor's Policy Statement* (Office of Planning and Budget 1982) concludes: "Community based services must continue to be the foundation of Georgia's service delivery system . . . consistent with the goal of . . . least restrictive environment." Id. at 44-45. See also, *Status Report on the Development of Mental Retardation Community Residential Services* (DHR 1982); *Standards for Group Homes for the Mentally Retarded* (DHR 1976).

These strong statements of policy favor MARC's claim of governmental immunity from operation of the Bibb County ordinance. To allow Bibb County to "zone

out'' the proposed group home would unquestionably frustrate the implementation of a clearly articulated state policy. See Region 10 Client Management, Inc., supra. The proposed land use is functionally equivalent to uses already allowed in the zoned districts, that is, single family residential. As in *Douglas County,* supra, the surrogate parents and mentally retarded clients will function as a single housekeeping unit, contributing to upkeep, household chores etc., The outward physical appearance of the group home (and with a few exceptions, the interior) will be identical to other homes in the neighborhood. The house will cost $133,000 to build. Thus the group home should be unobtrusive and have little, if any, adverse effect on the surrounding neighborhood.

I would reverse.

APPENDIX B

IN THE SUPERIOR COURT OF BIBB COUNTY, GEORGIA

File No. 603-C

MACON ASSOCIATION FOR RETARDED CITIZENS,

Petitioner

v.

MACON-BIBB COUNTY PLANNING AND ZONING COMMISSION,

Respondent

JUDGMENT

(Filed November 15, 1983)

In accordance with an Order by this Court entered simultaneously herewith, Judgment in the above-captioned action is hereby entered in favor of the Respondent and against the Petitioner, with all costs of this action to be paid by the Petitioner.

SO, ORDERED, this 15 day of November, 1983.

/s/ Bryant Culpepper
Honorable Bryant Culpepper
Judge, Bibb Superior Court

Consented to as to Form:

/s/ R. (Chix) Miller
Attorney for Petitioner

/s/ W. Terrell Wingfield, Jr.
Attorney for Respondent

IN THE SUPERIOR COURT OF BIBB COUNTY, GEORGIA

File No. 603-C

MACON ASSOCIATION FOR RETARDED CITIZENS,

Petitioner

v.

MACON-BIBB COUNTY PLANNING AND ZONING COMMISSION,

Respondent

ORDER

(Filed November 15, 1983)

The above-captioned action having come on before this Court pursuant to a Writ of Certiorari from a decision of the Macon-Bibb County Planning and Zoning Commission, and a hearing having been held on the matter, the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1.

Pursuant to a special amendment of the Constitution of the State of Georgia of 1945, ratified November 2, 1948 (Ga. Laws 1947, page 1240), amending Article VI, Section I, Paragraph IV of the Constitution of the State of Georgia of 1945, the City of Macon and Bibb County are vested separately and jointly with the general legislative authority to promulgate planning and zoning laws, rules and regulations as a direct grant of authority by the people

of Georgia. Pursuant to this authority, the Macon-Bibb County Planning and Zoning Commission was created by a joint ordinance and resolution of the City of Macon and County of Bibb, vesting in the Commission all power and authority to exercise planning and zoning for Macon and Bibb County. In exercising this power, the Commission adopted a Comprehensive Land Development Resolution, which was amended October 26, 1981 (hereinafter "Resolution").

2.

Under the Resolution, the City of Macon and all lands lying within the boundaries of Bibb County, Georgia were divided into twenty-eight (28) zoning districts so as . . . "To protect the character of existing neighborhoods; to prevent excessive density of population in areas which are not adequately served with water, sewerage facilities, and fire protection; to insure that adequate and suitable areas will be available in the City and County to provide housing for a growing population; to protect residential areas from the blighting effect of the traffic, noise, odors and dust generated by commercial and industrial activities; to provide for and accommodate growth and expansion of commercial and industrial activities; to prevent blight and slums; and to promote orderly growth and development by grouping similar and related uses together and by separating dissimilar and unrelated uses".

3.

Pursuant to that Resolution, uses of land and structures were provided for each zoning district as either a "permitted use" or a "conditional use". A permitted use is defined at Section 3.03[1] of the Resolution as "A use

which is allowed in the district in which the land is situated. Where a proposed use is a permitted use in accordance with other regulations herein, a Certificate of Zoning Compliance will be issued by the Zoning Enforcement Officer without a public hearing if such use otherwise complies with all applicable requirements of this Resolution. Where a permitted use would impact unfavorably on adjoining property the Commission, upon recommendation of the Zoning Enforcement Officer, and after a public hearing thereon, may require in appropriate situations as defined in Section 4.08, Buffer Areas and Screening". A conditional use is defined at Section 3.03[2] of the Resolution as "A use which may be allowed when the Commission, after a review of the application and a hearing thereon, finds as a fact that the proposed use or uses: (a) will be consistent with the general plan for the physical development of the district, including any master plan or portion thereof adopted by the Commission; (b) will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions; (c) will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood and will cause no objectionable noise, vibrations, fumes, odors, dust, glare, or physical activities; (d) will not adversely affect the health, safety, security, morals, or general welfare of the residents, visitors, or workers in the area; and (e) will be served by adequate public service and facilities including schools, police and fire protection, water, sanitary sewers, public roads, storm drainage, and other public improvements."

4.

Chapter 28 of the Resolution deals with amendments to the Resolution. Under said chapter, Petitioner, on or about April 14, 1983, submitted a petition to the Commission praying that the text of the Resolution be amended so as to provide as permitted uses in R-1AAA, R-1AA, R-1A, R-1, R-2A, R-2 and R-3 Districts, "Group Family Homes", defined as "A home established under the 'Community Services Act for the Mentally Retarded' (Ga. Laws 1972, page 700) and maintained by the Bibb County Board of Health, the Georgia Department of Human Resources, or the U. S. Department of Housing and Urban Development, with the number of mentally retarded individuals limited to a maximum of five (5) with a maximum of two (2) surrogate parents."

5.

As of the date of the amendment proposed by the Petitioner, the permitted uses allowed in the affected districts were as follows:

R-1AAA Single-Family Residential Districts:

Section 8.02 Permitted Uses:

[1] Single Family Dwellings.

[2] Accessory Buildings and uses located on the same lot or parcel of land as the main structure and customarily incidental to the permitted or conditional uses, provided the requirements of Section 4.07 are met.

[3] Fall-out Shelters, provided the requirements of Section 23.15 are met.

[4] Home Swimming Pools, provided the location is no closer than ten (10) feet to any property line and

the pool is enclosed by a wall or fence at least four (4) feet in height.

R-1AA, R-1A and R-1 Single-Family Residential Districts:

Section 9.02 Permitted Uses:

[1] Single Family Dwellings.

[2] Accessory Buildings and uses located on the same lot or parcel of land as the main structure and customarily incidental to the permitted or conditional uses, provided the requirements of Section 4.07 are met.

[3] Fall-out Shelters, provided the requirements of Section 23.15 are met.

[4] Home Swimming Pools, provided the location is not closer than ten (10) feet to any property line and the pool is enclosed by a wall or fence at least four (4) feet in height.

R-2A and R-2 Two-Family Residential Districts:

Section 10.2 Permitted Uses:

[1] Single Family Dwellings.

[2] Two-Family Dwellings (Duplexes).

[3] Accessory Buildings and uses located on the same lot or parcel of land as the main structure and customarily incidental to the permitted or conditional uses provided that the requirements of Section 4.07 are met.

[4] Fall-out Shelters, provided the requirements of Section 23.15 are met.

[5] Home Swimming Pools, provided the location is not closer than ten (10) feet to any property line and the

pool is enclosed by a wall or fence at least four (4) feet in height.

R-3 Multi-Family Residential Districts:

Section 11.02 Permitted Uses:

[1] Single Family Dwellings.

[2] Two-Family Dwellings (Duplexes).

[3] Accessory Buildings and uses located on the same lot or parcel of land as the main structure and customarily incidental to the permitted or conditional uses, provided that the requirements of Section 4.07 are met.

[4] Fall-out Shelters, provided the requirements of Section 23.15 are met.

[5] Home Swimming Pools, provided the location is not closer than ten (10) feet to any property line and the pool is enclosed by a wall or fence at least four (4) feet in height.

5.

The Resolution at Section 4.14 places a limitation on the occupancy of a dwelling unit, providing: "A dwelling unit may be occupied by not more than one (1) family, and such family may consist of not more than one (1) of the following: [1] One (1) person or two (2) or more persons related by blood or marriage, with no more than two (2) roomers or boarders, and with any number of natural children, foster children step-children or adopted children; or [2] a group of not more than four (4) persons not necessarily related by blood or marriage."

6.

The Resolution, as effective on the date of the amendment proposed by the Petitioner, provided for a "supportive living home", defined at Section 1.02[105] as "A facility non-institutional in character in which is provided room, meals and personal care for three (3) to fifteen (15) mentally ill adults. These homes are regulated and administered through the Mental Health Division of the Georgia Department of Human Resources", and a "group personal care home", defined at Section 1.02[46] as "A home established under the 'Community Services Act for the Mentally Retarded' (Ga. Laws 1972, page 700) and maintained by the Bibb County Board of Health, the Georgia Department of Human Resources, or the U. S. Department of Housing and Urban Development, with the number of mentally retarded individuals limited to the maximum of fifteen (15) with a minimum of three (3) supervisory personnel", as a conditional use in an R-3 District (Section 11.04[20] of the Resolution), a C-3 District (Section 12.04[19] of the Resolution), a C-2 and C-3 District (Section 13.04[28] of the Resolution), and a C-4 District (Section 14.04[23] of the Resolution).

7.

In accordance with Commission procedure, a public hearing was held upon Petitioner's proposed amendment on May 9, 1983 at which time the Petitioner, through counsel, was provided a full opportunity to present evidence in support of its proposal. The Commission was advised that the Department of Housing and Urban Development had allocated some $430,000.00 to the Petitioner to construction two group family homes. Peti-

tioner had thereupon obtained an option on a tract located at 1972 Wood Valley Drive in Macon, Bibb County, Georgia, which is located in a Single Family Residential District. Upon inquiry, Petitioner was advised that a group family home would not be permitted in that district and, thus, the reason for Petitioner's proposed amendment. Also at this hearing, interested members of the public were given the opportunity to voice their opinions. Subsequent to that hearing, the Commission deferred Petitioner's proposal and requested a legal opinion from the Commission's attorneys regarding the issues addressed by Petitioner's counsel, as well as a study by the staff.

8.

In the interim, Petitioner, through counsel, presented to the Commission an alternate proposal, the effect of which was substantially identical to the previous proposal in substance, but formulated in a different textual way.

9.

The matter again came on for a hearing on June 27, 1983, at which time Petitioner, as well as interested members of the public, were given a full opportunity to present evidence and voice their opinions. After the hearing, the Commission denied Petitioner's application.

10.

Within the time as provided by law, on July 21, 1983, Petitioner filed a Petition for Writ of Certiorari with this Court. Petitioner specifically assigned as error the following:

(a) Petitioner contended that the Commission's decision is null and void because its net effect is to deny equal protection to mentally retarded individuals in violation of Article I, Section I of the Georgia Constitution and in violation of the Fourteenth Amendment of the United States Constitution;

(b) Petitioner contended that the Commission's decision is null and void because it violates the policy of the State of Georgia announced in O.C.G.A. § 37-5-2;

(c) Petitioner contended that the Commission's decision is null and void because Petitioner's governmental function of providing housing for the mentally retarded pursuant to Georgia State policy is immune from the application of the Resolution; and

(d) Petitioner contended that the Commission's decision is null and void because it does not treat five (5) mentally retarded individuals living with two (2) surrogate parents as a "family" in violation of Georgia Law, as supported by case law from foreign jurisdictions.

11.

On the 12th day of August, 1983, Respondent filed with the Court its Answer, setting forth its affirmative defenses, responding to the individually numbered allegations of the Petitioner's Petition for Writ of Certiorari, and attaching a certified copy of the complete file of the Commission. The Respondent contended, among other things, as follows:

(a) That the decision of the Commission complained of was not a final determination by the Commission;

(b) That the Petitioner had failed to request a rehearing before the Commission as provided in Section 27.13 of the Resolution, had failed to exhaust its administrative remedies, and accordingly, could not be heard to complain upon actions taken by the Commission; and

(c) That the Petitioner's Petition should be dismissed for failure to exhaust administrative remedies available to the Petitioner.

Also filed by the Respondent on August 12, 1983 was a certificate certifying the pertinent portions of the Comprehensive Land Development Resolution.

12.

On the 30th day of August, 1983, Respondent filed a Motion to Dismiss Petitioner's Petition for Writ of Certiorari based upon Petitioner's failure to traverse or except to the Respondent's Answer. Petitioner, in turn, filed a Petition for Extension of Time based upon the position that the Answer filed by the Commission was in violation of O.C.G.A. § 5-4-8. The Court notified counsel that both motions would be denied and that the Court would proceed to consider the matter on the merits.

13.

Thereafter, a hearing was held before this Court on the 29th day of September, 1983. As a result of said hearing, the legal issues involved were formulated and counsel were directed to file with the Court briefs setting forth their positions as to the contested issues.

14.

Petitioner's initial argument was that Respondent's decision was unconstitutional because its net effect was to deny equal protection to mentally retarded individuals. Based upon the record, this Court finds that there is a rational basis for the definition of occupancy of a single family dwelling, as contained in the Resolution.

15.

Petitioner's second argument was that the decision of the Commission violated the policy of the State of Georgia as announced in O.C.G.A. § 37-5-2. The Court finds that this is purely an issue of law and will be dealt with hereafter.

16.

Petitioner's third argument is that Respondent's decision is null and void because Petitioner has a governmental function, which makes it immune from the application of the Resolution in this case of providing housing for the mentally retarded pursuant to Georgia State policy. Although it is governmentally financed and its employees paid by the State, this home is being operated by a non-profit organization or corporation, and not a governmental agency or department.

17.

Petitioner's fourth argument is that Respondent's decision is null and void because it does not treat five mentally retarded individuals living with two surrogate parents as a "family". Occupancy of a single family dwelling is defined by the Resolution, and the Court can find no

factual basis for stating that the definition is not a proper one. Based upon the record, there seems to be a legitimate reason for placing a limit on the number of non-related adults who may live together in a single family dwelling, and this Court will not interfere with the legislative discretion of the Respondent in this regard.

18.

Respondent takes the position that Petitioner failed to exhaust its administrative remedies by failing to request a rehearing. Based upon the record, the Court finds that a rehearing should be requested only when there is new or additional information (1) not available at the time of the original hearing, or (2) which was not presented for excusable neglect. The record does not indicate that any additional information was available.

19.

Respondent further argues that the Petitioner failed to exhaust its administrative remedies in that it did not try to have the tract of land, upon which it held an option, rezoned, and a conditional use granted, so that a group family home could be allowed at that site. The Court finds, however, that Petitioner's claim addresses itself to the broad spectrum of the zoning ordinance and not simply as to a conditional use.

CONCLUSIONS OF LAW

1.

Pursuant to O.C.G.A. §5-4-9, a traverse or exception to an answer in certiorari is not required to be filed.

Ga. Laws 1961, page 190, Section 6 provides that a traverse is permissive rather than mandatory, as it had been prior to the 1961 amendment.

2.

The Commission is not required to file an additional answer pursuant to O.C.G.A. §5-4-8. This procedure would be simply rendundant and a waste of Respondent's time.

3.

The Court herein finds the case of *Douglas County Resources, Inc. v. Daniel,* 247 Ga. 785, 280 S.E.2d 734 (1981) distinguishable from the case *sub judice. Douglas County* had a different definition of "family" from that utilized by the Respondent in its Resolution. The home proposed in *Douglas County* met the criteria of the *Douglas County* definition, but the trial court enjoined the intended use apparently because the intended occupants were retarded. Here, however, the Macon-Bibb County Planning and Zoning Commission's criteria precludes a group of more than four persons not related by blood or marriage. The definition of "family" is different in the *Douglas County* case. It is this Court's opinion that, if *Douglas County* had the same definition as Bibb County, the decision cited possibly would be different.

4.

As regards Petitioner's equal protection analysis, this Court finds that the Petitioner has failed to establish that mentally retarded adults fall within a suspect classification recognized by the United States Supreme Court.

The Supreme Court has been very strict in not recognizing suspect classifications other than race, origin, and alienage. Absent such a suspect classification, all Respondent must do is show that there is a rational basis for defining occupancy of a single family dwelling in the manner it has done. Upon examination of the record, the Court finds that Respondent is not engaging in any type of constitutionally prohibited discrimination.

5.

Contrary to Petitioner's position, the Court does not believe that O.C.G.A. §37-5-2 in any way requires or implies that group family homes must be allowed in a a particular location. The providing of community based alternatives to total institutional care does not imply that any activity so directed may be carried on outside the standards required by the local zoning ordinance.

6.

The Court finds as a matter of law that the Petitioner herein is not an organization of such a governmental nature as to exempt it from regulation by local zoning ordinances.

The Court can find no basis for stating that the definition of occupancy of a single family dwelling, as contained in the Resolution, is, as a matter of law, null and void. Accordingly, this Court will not interfere with the legislative discretion vested in the Macon-Bibb County Planning and Zoning Commission to exercise planning and zoning.

8.

Pursuant to Respondent's Resolution, Section 27.15, a rehearing is not necessary where there is no new or additional information which was not available at the time of the original hearing or which was not presented for excusable neglect.

9.

The Court finds that the Petitioner has standing to bring this Petition as it is "aggrieved" by the decision of the Commission denying its proposed amendment.

IT IS, THEREFORE, CONSIDERED, ORDERED AND ADJUDGED that the decision of the Macon-Bibb County Planning and Zoning Commission denying Petitioner's proposed amendment to the Comprehensive Land Development Resolution for the City of Macon and Bibb County, Georgia, is hereby sustained.

SO ORDERED, this 15th day of November, 1983.

HONORABLE BRYANT CULPEPPER
JUDGE, BIBB SUPERIOR COURT

Consented to as to Form:

R. (CHIX) MILLER
Attorney for Petitioner

W. TERRELL WINGFIELD, JR.
Attorney for Respondent

APPENDIX C

SUPREME COURT OF GEORGIA

ATLANTA, May 1, 1984

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

MACON ASSOCIATION FOR RETARDED CITIZENS V. MACON-BIBB COUNTY PLANNING AND ZONING COMMISSION

Upon consideration of the Motion for Rehearing filed in this case, it is ordered that it be hereby denied. All the Justices concur, except Smith and Gregory, JJ., dissent.

SUPREME COURT OF THE
STATE OF GEORGIA,

CLERK'S OFFICE, Atlanta, May 3, 1984

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/Joline B. Williams, Clerk.

APPENDIX D

IN THE SUPREME COURT OF GEORGIA

CASE NO. 40623

MACON ASSOCIATION FOR
RETARDED CITIZENS,

Appellant,

v.

MACON-BIBB COUNTY PLANNING
AND ZONING COMMISSION,

Appellee.

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the Macon Association for Retarded Citizens, appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Georgia, affirming the judgment in favor of appellee on April 4, 1984, and denying appellant's motion for rehearing on May 1, 1984.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

JONATHAN A. ZIMRING
Counsel for Macon Association
for Retarded Citizens

REMAR, ARNOLD & ZIMRING
Suite 630
133 Carnegie Way
Atlanta, Georgia 30303
(404) 688-4000

CERTIFICATE OF SERVICE

I, Jonathan Z. Zimring, hereby certify that I have this date served counsel of record for the parties in this action by depositing a copy of the within and foregoing Notice of Appeal in the United States Mail with sufficient postage affixed thereto.
Counsel served:

For Appellee:

O. Hale Almand, Jr.
W. Terrell Wingfield, Jr.
350 Second Street
Macon, Georgia 31201

and

For Appellant before this Court:

Richard B. Miller
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P.O. Box 229
Macon, Georgia 31297-8521

This 24th day of July, 1984.

JONATHAN A. ZIMRING

Office-Supreme Court, U.S.
FILED
AUG 30 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-156

In The

Supreme Court of the United States

October Term, 1984

MACON ASSOCIATION FOR RETARDED CITIZENS,
Appellant,

vs.

MACON-BIBB COUNTY PLANNING AND ZONING COMMISSION,
Appellee.

On Appeal From The Supreme Court Of Georgia

MOTION IN THE ALTERNATIVE TO DISMISS OR TO AFFIRM

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OTHER AUTHORITIES:

Nowak, Rotunda & Young, Constitutional Law, Second Edition, 1983	3

May It Please The Court:

Appellee moves that the appeal herein taken be dismissed on the ground that said appeal does not present a substantial Federal question.

———o———

OPINION BELOW

This is an appeal from a decision of the Supreme Court of Georgia reproduced in its entirety in Appendix A to Appellant's Jurisdictional Statement.

———o———

JURISDICTIONAL BASIS

The jurisdictional requirements are adequately set forth in Appellant's Jurisdictional Statement.

———o———

CONSTITUTIONAL PROVISIONS AND RESOLUTIONS

Pertinent constitutional provisions and resolutions are set forth in Appellant's Jurisdictional Statement.

———o———

STATEMENT OF THE CASE

Appellee generally concurs in the Statement of the Case set forth in Appellant's Jurisdictional Statement.

However, Appellant failed to take note of one important fact. Homes of the nature of those proposed by Appellant are excluded in Macon and Bibb County. The resolution does allow these homes in certain areas.

———o———

ARGUMENT

Appellant's argument before this Court is the same as was addressed to the Supreme Court of Georgia, and facially at least has some attractiveness: that the classification being made by the Appellee is one of distinguishing between mentally retarded versus "normal" individuals. The Supreme Court of Georgia found otherwise, appropriately utilizing the rational basis standard of *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974). The classification has nothing to do with mental capacity.

The Equal Protection Clause does not reject any rule making body's ability to classify persons or "draw lines" in the creation and application of law, but simply guarantees that those classifications or lines will not be based upon impermissible criteria or arbitrarily used to burden a class of individuals. Here, a rational basis existed for such "line drawing".

However, in an equal protection analysis, the initial determination must be to define the actual classification being used. Here, the Appellant suggests that the line is being drawn to exclude mentally retarded individuals (actually, as the Record shows, these homes only deal with mentally retarded adults and not mentally retarded chil-

dren). However, Appellee urges that Appellant's analysis is incorrect.

As pointed out in *Nowak, Rotunda & Young, Constitutional Law, Second Edition,* 1983, a classification within a law can be established in one of three ways. The first, and the applicable method in this case, is that the classification is established on the face of the law itself. The regulation here being dealt with distinguishes between five or more unrelated adults and four or less unrelated adults. The law, by its own terms, makes the class. Appellee asserts that this is the properly established classification in this case since there is no evidence in the record that the classification is being discriminatorily applied to subclasses within the class, i.e., that more than four mentally retarded individuals are being discriminated against vis-a-vis more than four "normal" individuals. In this regard, see *Arlington Heights v. Metropolitan Housing Development Corporation,* 429 U.S. 252.

A second prong of the equal protection analysis must determine the end or purpose of the legislation to determine whether persons similarly situated are being treated differently. The classification herein is a classic case of "under-inclusive" classification. The Appellee determined to draw the line between four unrelated and five unrelated individuals in defining family for the purpose of a single-family dwelling. Granted, in some fact situations, five or more unrelated individuals may live together in such a fashion as that they could be deemed a "family" under some, single-housekeeping unit definition. However, constitutionally, that is not the test. Rather, the test must be to determine whether the line which has been drawn

has a sufficient relationship to a proper governmental function. Perfection in line drawing is not necessary. *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471. In fact, a mere under-inclusiveness in line drawing is not fatal. *Nixon v. Administrator of General Services*, 433 U.S. 425. Rather, the classification must bear some fair relationship to a legitimate public purpose. *Plyler v. Doe*, 457 U.S. 202.

In this case, the legitimate public purpose for the line drawing is apparent. The concept behind residential neighborhoods, and the allowance in such neighborhoods of single-family dwellings, is one of maintenance of the residential character therein. However, a residential neighborhood would not maintain that characteristic were an apartment complex, fraternity or sorority house, or boarding house, be allowed to exist within that same neighborhood. Accordingly, it is urged that the Commission, in its legislative discretion, may determine that only up to four unrelated individuals should be allowed to live in a residential-type neighborhood so as to maintain the residential characteristics thereof.

Using this analysis, it is quite clear that a classification between four unrelated adults and five unrelated adults is neither a suspect class or a "middle tier" class, and it then becomes incumbent upon the challenger to establish an abuse of the legislative discretion. It is not the Court's function to hypothesize independently on the desirability or feasibility of possible alternative statutory schemes. *Caban v. Mohammed*, 441 U.S. 380. In this case, there is no evidence in the record to establish that the Appellee abused its legislative discretion in "line drawing" between four and five unrelated adult individuals.

Based upon the above analysis, it becomes apparent that Appellee is not discriminating against mentally retarded individuals. No more than four unrelated adults may live together in a single-family dwelling in Macon or Bibb County, regardless of their I.Q., shoe size, hair color or any other factor. Mental retardation is just one subclass of the broad class, and Appellant has failed to establish that the broad classification is constitutionally impermissible.

The Supreme Court of Georgia recognized this when it held that a group home, such as proposed by Appellant, does not constitute a permissible use, ". . . not because the inhabitants of the homes are mentally retarded, but rather because the inhabitants of the homes do not constitute [a family]. . . ." (Jurisdictional Statement, Appendix A at page six). Appellant never once addresses this issue; rather Appellant simply states that mental retardation is the classification and goes on to analyze the indicia of suspectness attached thereto. Unlike *Cleburne Living Center, Inc. v. City of Cleburne, Tex.*, 726 F. 2d 191 (5th Cir. 1984), which specifically classifies homes for the feeble-minded, the ordinance herein deals solely with the number of unrelated individuals making up a "family".

Once it is recognized that the above analysis reaches the correct conclusion, the applicability of *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974) becomes obvious. Both ordinances deal with delimiting the number of unrelated persons occupying one-family dwellings. The decision did not rest upon the fact that the challengers were college students, free to travel and unsupervised as they may be. No, the decision is precedent for the fact that, in drawing

numerical lines, minimum scrutiny applies. Rather than inapposite to the facts of the case sub judice, as suggested by the Appellant, *Belle Terre* is factually "on all fours".

CONCLUSION

Once the appropriate classification is recognized, it is clear that the holding below closely tracks this Court's prior decision in *Belle Terre* and therefore does not present a substantial federal question.

Respectfully submitted,

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Attorney for the Macon-Bibb County Planning and Zoning Commission